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Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

October Term, 1985

L.B.G. PROPERTIES, INC.,
Petitioner

vs.

CHISHOLM REALTY COMPANY, LTD.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does a court of appeals have jurisdiction under 28 U.S.C. §158(d) to review a district court's decision which reverses a bankruptcy court's order confirming a Chapter 11 plan of reorganization?

LIST OF PARTIES

The parties to the proceeding below and before this Court are the petitioner L.B.G. Properties, Inc., debtor and debtor in possession, and the respondent Chisholm Realty Company, Ltd. The petitioner is the wholly owned subsidiary of The Holding Company.

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L.B.G. PROPERTIES, INC.,

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vs.

CHISHOLM REALTY COMPANY, LTD.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner L.B.G. Properties, Inc., debtor and debtor in possession, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered

in the proceeding below on November 26, 1985, rehearing denied on February 19, 1986.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is not reported and is reprinted in the appendix hereto, p. App. 1, *infra*.

The decisions of the United States District Court for the Southern District of Florida and of the United States Bankruptcy Court for the Southern District of Florida likewise are unreported and are reprinted in the appendix hereto, p. App. 3, and p. App. 5, *infra*, respectively.

JURISDICTION

Petitioner commenced a bankruptcy case under Chapter 11 of title 11, United States Code, on July 22, 1983, seeking to reorganize its affairs. On February 22, 1984, the Bankruptcy Court confirmed petitioner's plan of reorganization. See p. App. 5, *infra*.

Respondent appealed to the District Court, which reversed the Bankruptcy Court's confirmation order. See p. App. 3, *infra*. Petitioner when appealed to the Court of Appeals, which dismissed the appeal for lack of appellate jurisdiction. See p. App. 1, *infra*. Petitioner sought rehearing, which was denied on February 19, 1986. See p. App. 2, *infra*.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

STATEMENT OF THE CASE

Petitioner is a corporation which acquired an apartment project in Broward County, Florida, from respondent with the intention of converting the rental apartments into condominiums. At the time petitioner acquired the property, it gave respondent a third mortgage on the project to secure the unpaid balance of the purchase price. Subsequently, the market for condominiums deteriorated substantially, and petitioner began having difficulties meeting its obligations. After respondent instituted a mortgage foreclosure action in state court, petitioner filed a petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §1101 *et seq.*, to reorganize its financial affairs.

Petitioner immediately proposed a plan of reorganization, which was attacked at every opportunity by respondent (but not by any other creditor, secured or unsecured). As a result of hearings before the Bankruptcy Court, petitioner amended its plan of reorganization to comply with the findings of the

Bankruptcy Court. The respondent's objections and the Bankruptcy Court's findings are set forth in opinions of the Bankruptcy Court, p. App. 9 and p. App. 15, *infra*. The petitioner's amended plan of reorganization ultimately was confirmed by the entry of the Order Confirming Second Modified Plan of Reorganization, p. App. 5, *infra*.

Respondent appealed the Bankruptcy Court judgment to the District Court. There, respondent attacked the Bankruptcy Court's decision primarily on the basis that the amended plan of reorganization did not give respondent, a dissenting secured creditor, the "indubitable equivalent" of its claim pursuant to the standards for confirmation found in 11 U.S.C. §1129, specifically subsection (b)(2)(A)(iii). Although the Bankruptcy Court had discussed the issue in some detail, pp. App. 9-14, *infra*, the District Court's reversal stated cryptically, "The Second Amended Plan, with particular reference to the standby letter of credit, but not limited to that portion of the plan, does not provide Chisholm [respondent] with the 'indubitable equivalent' of its allowed secured claim, as that term has been defined by Congress." [Citations omitted]. See p. App. 3-4, *infra*. With that, the District Court remanded to the Bankruptcy Court.

Petitioner, aggrieved by the unexplained objection to its plan of reorganization by the District Court, appealed pursuant to 28 U.S.C. §158(d) to the Court of Appeals for the Eleventh Circuit. That court, *sua sponte*, directed the parties to simultaneously brief whether the District Court's reversal was a final, appealable order. Thereafter, the Court of Appeals dismissed the appeal. See p. App. 1, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S VIEW OF ITS JURISDICTION IN BANKRUPTCY APPEALS IS TOO NARROW, HINDERS THE EFFICIENT ADMINISTRATION OF BANKRUPTCY CASES, AND CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Confirmation of a Chapter 11 plan of reorganization by a bankruptcy court conclusively determines all creditors' rights to assets in the bankruptcy estate and ownership rights in the reorganized business; after confirmation, nothing is left to be done except to distribute assets or indicia of ownership of the reorganized debtor according to the plan of reorganization. *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1378 (9th Cir. 1985); 11 U.S.C. §§ 1141, 1142. Thus, the confirmation order is *the* single most conclusive order in a Chapter 11 case. As such, there is no question that a confirmation order entered by a bankruptcy court under the authority of 28 U.S.C. §157(b)(2)(1) is a final order subject to appellate review by the district court under 28 U.S.C. §158(a).

> Of all the possible orders in a chapter 11 bankruptcy case—except, perhaps, an order closing or dismissing the case—the order confirming a plan most nearly fits the Supreme Court's definition of a final order as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1378 (9th Cir. 1985) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). *See also Prudence Realization Corp. v. Ferris*, 323 U.S. 650 (1945); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). However, by dismissing the appeal, the Eleventh Circuit now has held that it cannot review a district court order which concludes that a plan of reorganization confirmed by a bankruptcy court does not meet the standards for confirmation found in 11 U.S.C. §1129 because, it holds, the decision is not a final order entitled to appellate review by 28 U.S.C. §158(d). The result of this conclusion is that the legal sufficiency of the plan of reorganization likely will never be tested before the Eleventh Circuit.

That result follows from the actual mechanics of bankruptcy administration. Upon reversal of an order confirming a plan of reorganization, parties in interest essentially are faced with a choice between (1) formulating a new plan of reorganization which hopefully will pass appellate muster, or (2) liquidation of the debtor's assets and business by having the bankruptcy case converted to a Chapter 7 case or dismissed.

In the first scenario, if the debtor's new reorganization plan meets the approval of the objecting creditors and is confirmed by the bankruptcy court, the debtor hardly can appeal to the district court on the basis that the old plan should have been confirmed if it has any interest in implementing the new plan—a party cannot appeal from a judgment while enjoying the fruits of it. Affirmance of the new plan by the district court presumably then would give the court of appeals jurisdiction to review the le gal sufficiency of the new plan; even if the court of appeals found the old plan, as well as the new one, to be

legally sufficient, it cannot very well vacate the order confirming the new plan and reinstate the order confirming the old plan when distributions and business operations in consummation of the new plan very well may have begun.

In the second scenario, the liquidation of the debtor, the only possible appellate review would be from the order dismissing the case or converting the case to a liquidation case—that review would be meaningful only if the liquidation were stayed pending appeal. The net conclusion is that, under the Eleventh Circuit's view, review must await significant further events in the administration of the bankruptcy estate, events which will change, moderately or severely, the condition of the debtor's business, with the most likely result being the inability to effectuate the old plan of reorganization even if the court of appeals ultimately approves its legal sufficiency.

This position certainly is contrary to that of the Seventh Circuit, which has made clear that a district court order remanding a case to a bankruptcy court for further significant proceedings is not appealable "provided that the order may be *effectively* reviewed on appeal from the bankruptcy court's 'final final' decision." *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 546 (7th Cir.), *cert. denied*, 106 S.Ct. 233 (1985) (emphasis added). *Cf. United Steelworkers of America Local 1913 v. Union Railroad Co.*, 648 F.2d 905, 910-911 (3d Cir. 1981); *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973).

The predicament in which the Eleventh Circuit has placed petitioner follows from its failure to consider the unique characteristics of bankruptcy cases. In their

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excellent discussion of bankruptcy appellate jurisdiction, the authors of Wright, Miller & Cooper, *Federal Practice & Procedure*, §3926 (Supp. 1986) state, at pages 69 and 71:

> The most important concern in defining the final judgment jurisdiction of the courts of appeals is that it not be limited rigidly to the concepts of finality that apply in other settings. In many ways, bankruptcy proceedings justify a distinctive and more flexible definition of finality. The special needs of complex multiparty bankruptcy administration have long justified distinctive rules for timing appeals, and there is no justification for suddenly scrapping the long experience under earlier statutes. In addition, some consideration must be given to the fact that most cases will come to a court of appeals only after a district court or appellate panel has decided the matter as an appellate tribunal. . . .
>
> * * *
>
> A determination to develop a unique concept of finality for bankruptcy appeals of course does not mean that every bankruptcy order is final and appealable when entered. Just as some orders have been found final, others have been found nonfinal and will continue to be found nonfinal. Wise development and application of the bankruptcy concept of finality will require a sophisticated knowledge of substantive bankruptcy law, bankruptcy procedure, and actual bankruptcy administration. . . . It would

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> be surprising in the extreme to discover that the best rules for timing bankruptcy appeals were the same as the best rules for timing appeals in more routine civil litigation.

Case law support for these propositions, and fuller explanations, are found in *In re Saco Local Development Corp.*, 711 F.2d 441 (1st Cir. 1983) and *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983), as well as in the cases found in the footnotes to the quoted discussion.

The error of the Eleventh Circuit's narrow view of its jurisdiction under 28 U.S.C. §158(d) is evidenced by its conflict with holdings of the Seventh and Ninth Circuits. In *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985), in a discussion at pages 1377-78, the Ninth Circuit squarely holds that it has jurisdiction to review a district court's order vacating a bankruptcy court confirmation order. The Seventh Circuit, without discussion of its appellate jurisdiciton, reversed a district court's reversal and reinstated a bankruptcy court confirmation order. *In re Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984). While the result in *Madison Hotel Associates*—the reinstatement of the bankruptcy court confirmation order—clearly exemplifies the benefits of review by the court of appeals, the Ninth Circuit has directly addressed the issue in several opinions. *In re Sambo's Restaurants, Inc.*, 754 F.2d 811 (9th Cir. 1985) adopted a broad view of circuit court jurisdiction under 28 U.S.C. §158(d). There, following the Third and Eighth Circuits (*In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982); *In re Bestmann*, 720 F.2d 484 (8th Cir. 1983)), quoting *Marin Motor Oil*, the Ninth Circuit held that " 'when the bankruptcy court issues what is indisputably

a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for purposes of section 1293(b).' "[1] 754 F.2d at 814. The gist of the Ninth Circuit's reasoning is found in these excerpts from pages 814-15, with citations omitted:

> [T]he district court is acting as an appellate tribunal in reviewing the trial (bankruptcy) court's final order. The policies underlying the finality requirement in ordinary cases thus do not apply. First, although bankruptcy courts would still have to conduct full adversary proceedings on remand from these types of district court decisions, litigation on these causes of action would be completed and the bankruptcy court would have nothing further to do if we reversed the district court. Moreover, these sort of district court judgments are final in the sense that nothing remains for the district court to do.
>
> Second, our role and that of the district court is essentially the same in this appellate process. We are in as good a position to review the bankruptcy court's decision as is the district court. Thus, when we review a district court decision with respect to a final order of a bankruptcy court, we in essence are reviewing the final order of the bankruptcy court.

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[1] 28 U.S.C. §1293(b), repealed by Pub.L. 87-189, 75 Stat. 417, which added 28 U.S.C. §158, was the predecessor of 28 U.S.C. §158(d), and the operative language read almost identically with the language found in §158(d).

> Third, many of the principal reasons for the finality requirement are based on maintaining the proper relationship between trial and appellate courts. Those reasons are unpersuasive when one appellate court is reviewing another lower appellate court rather than the decision of a fact finder.
>
> Fourth, one of the most compelling reasons for the finality rule is the avoidance of unnecessary appeals and interruptions of trial, thereby saving judicial time and expense. Where the original appeal from the bankruptcy court is from a final judgment rather than from an interlocutory order, however, the delay factor is not compelling.

Many of these same concerns were voiced by the Third Circuit in *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 448-49 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

The Eleventh Circuit's decision below refutes none of these concerns. See p. App. 1, *infra*. In fact, the court's reliance on *TCL Investors v. Brookside Savings & Loan Ass'n.*, 775 F.2d 1516 (11th Cir. 1985), not only fails to address these issues but is misplaced as well—in *TCL Investors*, the Eleventh Circuit noted that the district court had remanded for further fact-finding and that, "[u]ntil the factual record is fully developed, as required by the district court, the issues presented cannot be adequately presented on appeal." 775 F.2d at 1519. In the case below, however, the district court ruled on the merits of petitioner's plan of reorganization and left the bankruptcy court with nothing to do but elicit a new plan of reorganization or a motion to liquidate the

debtor's business. See p. App. 3, *infra.* Simply stated, the Eleventh Circuit, unlike other courts of appeals, has not properly focused upon the legitimate problems found in appellate review of proceedings in bankruptcy cases. Moreover, it has not even followed its own precedent.

II.

THE DECISION BELOW IS NOT ABERRATIONAL BUT REFLECTS THE ELEVENTH CIRCUIT'S CONFUSED CONCEPT OF ITS JURISDICTION.

Recently the Eleventh Circuit has recognized, "In bankruptcy proceedings, it is generally the particular adversary proceeding or controversy that must have been finally resolved, rather than the entire bankruptcy litigation." *In re Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985). This general comment, however, belies the Eleventh Circuit's approach to review of bankruptcy matters, which is derived from its decision in *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982). And it is contradicted by a decision three weeks later in *In re Wisz*, 778 F.2d 762 (11th Cir. 1985), where the Eleventh Circuit held that a district court affirmance of an order overruling a debtor's claim of exemption under 11 U.S.C. §522(b) is not a final order for purposes of its review. The court stated, "Wisz will not be harmed by reserving his appeal on the issue until this court has a final order before it." 778 F.2d at 764. What the Eleventh Circuit failed to explain is what will constitute a final order which will provide an opportunity for review of the exemption issue. *See* Bankruptcy Rule 4003, which establishes the procedure for claiming exemptions and for objecting to claimed

exemptions; Rule 4003(c) states, "After hearing on notice, the [bankruptcy] court shall determine the issues presented by the objections." Furthermore, the Eleventh Circuit did not even acknowledge *In re Barker*, 768 F.2d 191 (7th Cir. 1985) or the cases discussed therein which hold that orders granting or denying exemptions are reviewable by the courts of appeals. As both *Barker* and *In re Brissette*, 561 F.2d 779 (9th Cir. 1977) explain, as a practical matter an order on exemptions is the final resolution of parties' rights. If the property is held to be exempt, there may be little remaining to distribute to creditors to warrant further creditor participation; if the property is held not to be exempt, the bankruptcy trustee presumably would administer the property and sell it. 768 F.2d 193-94; 561 F.2d 781-82.

It is clear from these cases that the Eleventh Circuit has failed to address the realities of bankruptcy cases. *See generally* Wright, Miller & Cooper, *Federal Practice & Procedure*, §3926 (Supp. 1986). Thus, it is not surprising that it has reached the results it has in the proceeding below and in similar cases.

CONCLUSION

For these reasons, this petition for certiorari should be granted, to address important issues of bankruptcy administration and to bring the Eleventh Circuit's misapprehension of its jurisdiction into line with the other courts of appeals.

Respectfully submitted,

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-5639

IN RE: L.B.G. PROPERTIES, INC.,
Debtor.

CHISHOLM REALTY COMPANY, LTD.,
Plaintiff-Appellee

versus

L.B.G. PROPERTIES, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED. *TCL Inventors v. Bookside Savings & Loan Association*, ____ F.2d ____ (11th Cir. 1985).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-5639

IN RE: L.B.G. PROPERTIES, INC.,
Debtor.

CHISHOLM REALTY COMPANY, LTD.,
Plaintiff-Appellee,

versus

L.B.G. PROPERTIES, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

Appellant's petition for rehearing, treated as a motion for reconsideration of the order of November 26, 1985 is DENIED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-896-Civ-EATON

IN RE: L.B.G. PROPERTIES, INC.,
Debtor.

CHISHOLM REALTY COMPANY, LTD.,
Appellant,

vs.

L.B.G. PROPERTIES, INC.,
Appellee.

ORDER OF REMAND

Having heard oral argument of this appeal from the bankruptcy court's confirmation of the Debtor's Second Modified Plan of Reorganization, and of two interlocutory orders related to that confirmation order, and having considered the briefs of counsel and the record, it is

ORDERED and ADJUDGED that this cause be, and the same is, hereby REMANDED to the bankruptcy court for further consideration. Section 1129 of the Bankruptcy Code allows a plan to be confirmed over the objection of an impaired creditor such as Chisholm Realty Company, Ltd. (Chisholm) only if the plan provides the impaired creditor with the "indubitable equivalent" of the allowed amount of its secured claim. The Second Amended Plan, with particular reference to the standby

letter of credit, but not limited to that portion of the plan, does not provide Chisholm with the "indubitable equivalent" of its allowed secured claim, as that term has been defined by Congress. *See S. Rep. No. 2266, S. Rep. No. 95-090,* 95th Cong. 2d Sess. (1978), *citing In re Murel Holding Corp.,* 75 F.2d 941 (2d Cir. 1935) (Learned Hand, J.). *See also, In re American Mariner Industries, Inc.,* 10 Collier Bankr. Cas. 2d 910 (MB) (9th Cir. 1984).

DONE and ORDERED at Miami, Southern District of Florida, this 8th day of July, 1985.

/s/ Joe Eaton
United States District Judge

cc: counsel of record

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-01358-BKC-TCB

[Chapter 11]

In re:

L.B.G. PROPERTIES, INC.
ID# 59-203-5868

Debtor

ORDER CONFIRMING SECOND MODIFIED PLAN OF REORGANIZATION

The second modified plan under chapter 11 of the Bankruptcy Code filed by *L.B.G. Properties, Inc.* on December 15, 1983, CP# 67 and the second modified plan having been transmitted to creditors, equity security holders and Securities and Exchange Commission; and

It having been determined after hearing on notice:

1. That the second modified plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law; and

2. That the provisions of chapter 11 of the Code having been complied with; that the second modified plan has been proposed in good faith and not by any means forbidden by law; and

3. Each holder of a claim or interest has accepted the amended plan [or will receive or retain under the

second modified plan property of a value, as of the effective date of the amended plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date] [or, the second modified plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the second modified plan]; and

4. All payments made or promised by the debtor or by a person issuing securities or acquiring property under the second modified plan or by any other person for services or for costs and expenses, or in connection with the second modified plan and incident to the case, will be subject to the approval of the court; and

5. The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, of the debtor [and an affiliate of the debtor participating in a joint second modified plan with the debtor] [or a successor to the debtor under the second modified plan], after confirmation of the second modified plan, have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable, and consistent with the interest of the creditors and equity security holders with public policy; and

6. The identity of any insiders that will be employed or retained by the debtor and his compensation have been fully disclosed; and

7. Confirmation of the second modified plan is not likely to be followed by the liquidation, or the need

for further financial reorganization, of the debtor or any successor to the debtor under the second modified plan];

8. The court shall retain jurisdiction as provided in the second modified plan until there is substantial consummation of the second modified plan. The second modified plan is modified if it calls for retention of jurisdiction beyond that point.

9. *Timothy J. Norris* is named disbursing agent without additional compensation. Bond is waived. He is directed to submit an order for payment of dividends to provide for all payments to be made on the effective date of the second modified plan. When that order is entered, he shall then file a deposit and disbursement statement and submit checks and a bank statement covering the disbursements called for on the effective date of the second modified plan. When all checks have cleared, he shall file a final report and application for final decree.

The Second Modified Plan [CP #67] filed by the debtor on December 15, 1983 is confirmed. Confirmation is subject to the debtor's stipulations noted in the Memorandum Decision of January 18, 1984 [CP #80]. Confirmation is also subject to the condition subsequent noted in the Order Denying Chisholm's Motions entered February 22, 1984 [CP #97], which requires that the debtor refund its second mortgage and make its first distribution as stipulated by its plan not later than February 29, 1984. Jurisdiction is expressly retained to vacate confirmation if condition subsequent is not met.

DONE and ORDERED at Miami, Florida, this 22nd day of February 1984.

/s/ THOMAS C. BRITTON
THOMAS C. BRITTON
Bankruptcy Judge

xc: Debtor
Timothy J. Norris, Atty. for Debtor
Britton, Cohen, Atty. for Chisholm Realty, Creditor

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-01358-BKC-TCB

In re:

L.B.G. PROPERTIES, INC.

Debtor.

MEMORANDUM DECISION (CHISHOLM'S OBJECTION TO CONFIRMATION)

A confirmation hearing was held on December 5 upon this chapter 11 debtor's plan filed August 24. (C. P. No. 18). Chisholm Realty Company Ltd., a New York limited partnership, was the only objector. (C. P. No. 58).

Chisholm's primary objection was that the plan is not feasible, because the success of the plan depends upon the debtor's ability to convert its property (a 183 unit Broward apartment project) into condominiums and to market those units at the projected price and pace. I heard considerable evidence (the transcript is 108 pages) and resolved that contention against Chisholm. (C. P. No. 65). However, Chisholm had also identified three respects in which its contractual rights under its third mortgage were significantly impaired by the plan without an offsetting benefit. For that reason, confirmation was denied under 11 U.S.C. § 1129(b)(2)(A)(iii). The debtor was granted ten days within which to file a modified plan curing these deficiencies. (C. P. No. 65). Within the time stipulated, the debtor filed a Second Modification

of Plan of Reorganization (C. P. No. 67) which cures those deficiencies.

At the continued confirmation hearing held December 19, Chisholm continued its opposition and estimated that it required several hours to present evidence in support of its position. The hearing was, therefore, continued a third time to January 6.

At the January 6 hearing, Chisholm offered testimony again relating to the issue of feasibility. I held that the issue had been tried and resolved and that I would not consider further evidence on that point. Although Chisholm insists that the evidence it wished to present did not relate to the issue of feasibility, Chisholm's summary description of that evidence and the testimony heard before the ruling indicated otherwise.

Chisholm, the former owner of this property, holds a third wrap-around mortgage on the property, which obligates it to satisfy a first mortgage of $1.8 million and a second mortgage of $700,000. Its mortgage was in default when this bankruptcy petition was filed. The bankruptcy frustrated Chisholm's effort to place the project in receivership. It is understandable, therefore, that Chisholm would like to recover possession and control of the property.

The sole issue remaining before me on January 6 was whether the Second Modification cured the three deficiencies noted in the Order Denying Confirmation. However, Chisholm has argued at least six other deficiencies. Out of an abundance of caution, I heard those further objections, which exceeded Chisholm's

filed Objection (C. P. No. 58) and, therefore, might well have been disregarded.

With respect to Chisholm's contention that there is no "undubitable equivalent" provided under the plan, as amended, of the debtor's contractual obligation to sell at least 80,000 square feet of condominiums (49% of the project), before closing any condominium conversion sales I am persuaded that confirmation of this plan must be conditioned upon the debtor's stipulation made before me on January 6 that it remains bound by that contractual stipulation.

With respect to Chisholm's contention that unless the condominium conversion is conducted in phases accompanied by approved replatting of the property, conversion will cause the property taxes to increase by approximately $140,000 I will condition confirmation upon the debtor's stipulation made before me on January 6 that it will phase and replat the project as demanded by Chisholm.

Only one of Chisholm's remaining objections merits specific comment. Paragraph 6 of the Modification of Mortgage dated September 15, 1982 between these parties provides that:

> "Principal payments under the Note in the amount of $1,200,000, . . . shall have been paid or shall be accelerated to be due not later than a date six months after the execution of the consent [to condominium conversion] . . ."

Chisholm argues that the plan provides no "indubitable equivalent" of that stipulation. The debtor argues that

Chisholm's mortgage as modified contemplates that and the debtor's plan provides that the existing first mortgage ($1.8 million) must be and will be fully satisfied before any part of the property can be marketed as a condominium, and that by its projections, the first mortgage will have been completely satisfied by the date the $1.2 million becomes payable to Chisholm. Chisholm insists that the stipulation for payment of $1.2 million is in excess of and unrelated to the obligation to satisfy the first mortgage. Chisholm argues that it is entitled to this payment because condominium conversion materially depreciates its security.

The contractual stipulation is not explicit. Because it was drafted by Chisholm, ambiguity must be resolved against Chisholm. I construe the mortgage as modified to require that the debtor must have paid not less than $1.2 million not later than a date six months after the execution of consent to condominium conversion, but that Chisholm, is obliged (by paragraph 39 of the mortgage) to satisfy the first mortgage by payment in full in order to effect condominium conversion. The contractual agreement clearly contemplates that the debtor will have the option of condominium conversion. Therefore, I construe the agreement to require that upon the debtor's election to convert the property to condominiums, Chisholm must apply payments received from the debtor toward satisfaction of the first mortgage as required to prevent frustration of the condominium conversion and that such payments must be credited toward the debtor's obligation to pay the $1.2 million.

If, therefore, by the time the $1.2 million falls due, the first mortgage has been satisfied, the debtor's obligation to pay $1.2 million will have been satisfied.

If, however, the debtor's projections are not realized and the first mortgage remains unsatisfied when the $1.2 million payment falls due, the debtor remains contractually obligated to make good the shortfall at that time.

In arriving at the foregoing construction, I have attempted to give reasonable effect to the entire document as modified and the intent of the parties as reflected by that document.

I find and conclude, therefore, that the debtor's plan (subject to the stipulated modifications referred to above) meets the requirements of §1129(b)(2)(A)(iii) with respect to its treatment of Class IV (Chisholm) and, therefore, the cramdown provision of §1129(b)(1) is applicable with respect to Chisholm's claim.

Although the debtor's counsel has represented that all other classes affected by the plan have accepted the plan by the requisite margin, by a separate order I reserve ruling on confirmation until the debtor certifies that fact and until the Clerk of this Court confirms that certification. This routine order also requires a deposit in escrow of sufficient funds to satisfy the first distrubution required under the plan.

Subject to the debtor's compliance with that order, therefore, the debtor's plan will be confirmed.

DONE and ORDERED at Miami, Florida, this 18th day of January, 1984.

/s/ Thomas C. Britton

Thomas C. Britton
Bankruptcy Judge

Copies
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Attorney for Debtor
John L. Britton, Esquire
Attorney for Chisholm

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-01358-BKC-TCB

In re:

L.B.G. PROPERTIES, INC.

Debtor.

ORDER DENYING CHISHOLM'S MOTIONS

Three motions filed by a secured creditor, Chisholm, were heard on February 13.

1. The motion for rehearing (C. P. No. 88) addressed to the Memorandum Decision (Chisholm's Objection to Confirmation) (C. P. No 80) entered January 18 is denied.

2. The motion for an order requiring the debtor to file a third modification of its plan and an amended disclosure statement (C. P. No. 87) is bottomed on the fact that on January 18 (C. P. Nos. 80, p. 3) I conditioned confirmation of the Second Modified Plan (C. P. No. 67) upon the debtor's stipulation before me on January 6 that it would comply with two demands made by Chisholm at that hearing. The debtor agreed that it remained bound by a contractual stipulation in Chisholm's mortgage and that it will phase and replat its condominium conversion, this ameliorating or delaying any property tax increase.

Neither stipulation required modification of the debtor's plan. If either did, neither adversely changed

the treatment of the claim of any creditor or any other party. The stipulation merely made explicit on this record the debtor's existing implicit obligations.

I do not agree with Chisholm that §1127(a) requires that the debtor file a modification and an amended disclosure statement for these stipulations to be binding upon the debtor. It is clearly sufficient that the stipulation be reflected in the court's order. §1141(c). Nor do I agree that these stipulations entitle Chisholm to reargue the feasibility of the debtor's Plan. The motion for an order requiring the debtor to file a third modification of its plan is denied.

3. Chisholm's objection to the debtor's report on the amount to be deposited before confirmation and its motion to dismiss the case (C. P. No. 91) rests upon the Order Reserving Ruling on Confirmation entered January 16. (C. P. No. 79). It is my practice to use the discretion granted in B.R. 3020(a), to require deposit before confirmation of the money to be distributed after confirmation. This order so provided and reserved discretion to dismiss the case if the debtor failed to comply.

In this instance, the routine order was not appropriate. An essential element of this debtor's plan is the refunding of the existing second mortgage, providing $700,000 in new funds and satisfying part of Chisholm's claim. Of course, as a practical matter, this mortgage cannot be refunded before confirmation. It is unreasonable to require the debtor to deposit those funds before confirmation. The motion to dismiss is denied.

The Order of January 16 is modified to require that the debtor refund its second mortgage and make its first distribution as stipulated by its plan not later than February 29. The debtor is excused from making a deposit before confirmation.

The debtor's Second Modified Plan filed December 15, 1983 (C. P. No. 67) is being confirmed by a separate Order. That Order will reserve jurisdiction to vacate confirmation if the condition subsequently imposed by this Order is not met by the debtor by February 29.

DONE and ORDERED at Miami, Florida, this 16th day of February, 1984.

/s/ Thomas C. Britton

Thomas C. Britton
Bankruptcy Judge

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